Bank Pertanian Malaysia Bhd v Gagnar Corp Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM) (MUA)-77–01 OF 2020
KAMALUDIN MD SAID, LEE SWEE SENG AND GUNALAN MUNIANDY JJCA
12 JULY 2021

Civil Procedure — Appeal — Appeal against decision of High Court — High Court allowed respondents to amend its re-amended defence and counterclaim — Respondent raised preliminary objection against appellant's appeal — Whether the order was appealable — Whether the order was a 'ruling made in the course of a trial' — Courts of Judicature Act 1964 ss 3 & 67

This was the appellant's appeal against the High Court's order dated 13 December 2019 which allowed the respondents to amend its re-amended defence and counterclaim. The respondents raised a preliminary objection that the High Court order allowing the re-amendment of defence and counterclaim was non-appealable and the appellant's appeal was incompetent in limine. On 13 August 2015, the appellant brought an action against the respondents to recover monies due and owing under an Al-Bai Bithaman Ajil facility granted by the appellant to the first respondent ('BBA facility'). The remaining respondents were sued as guarantors under the BBA facility. On 22 October 2015, the respondents filed their defence and counterclaim. On 23 December 2015, the respondents amended their defence and counterclaim ('first amendment'). The appellant then filed an application for summary judgment against the respondents in encl 17. To oppose encl 17, the respondents produced an expert report prepared by Dr Hakimah Yaacob expressing a preliminary finding that the BBA facility was not Shariah compliant ('preliminary report'). The appellant later withdrew encl 17 and the parties proceeded with pre-trial case management. During case management, the respondents' counsel indicated that there might be a need to re-amend their amended defence and counterclaim after their expert produced a full report on the validity of the BBA facility and on 4 August 2017, the respondents filed an application to re-amend the amended defence and counterclaim in encl 52. The High Court allowed encl 52 and the re-amendments became the respondents' re-amended defence and counterclaim ('second amendment'). During the trial, the respondents called two witnesses ie Dr Hakimah Yaakob ('DW1') and Hamidah bt Osman ('DW2'). On 23 October 2019, ie 34th day of trial, the appellant took objection to an answer given by DW2. The appellant objected to DW2's evidence that the financing agreements for the BBA facility were signed towards the end of April 2011. The court adjourned the trial and a new trial dates were fixed. On 4 November 2019, the

respondents filed the re-amendment application in encl 188. The re-amendment application was heard on 9 December 2019 and the decision was reserved ('third amendment'). On 13 December 2019, the learned judge allowed the re-amendment application. The appellant appealed against the decision of the learned judge in allowing the re-amendment application on 10 January 2020.

Held, allowing the respondent's preliminary objection and striking out the appeal with costs in the cause:

(1) The argument by the appellant that the order dated 13 December 2019 was not a 'ruling made in the course of a trial' was misplaced. The re-amendment application was heard on 9 December 2019 and on 13 December 2019, the re-amendment application was allowed before continuation of trial on 13 December 2019. In any event the trial at the High Court had yet to be completed, hence the High Court did not finally dispose of the right of the parties. The events show that the respondent's application was made during the trial and before the completion of trial therefore, the order of the High Court dated 13 December 2019 was a 'ruling made in the course of a trial' (see paras 33–34).

(2) On the same facts and circumstances, the court was bound by the principle of stare decisis in the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1 that an appeal did not lie against a decision in an amendment application made in the course of a trial when such a decision did not finally dispose of the rights of the parties. In the circumstances, the preliminary objection raised by the respondents that the High Court order dated 13 December 2019 was non-appealable was allowed. The appeal was incompetent in limine and ought to be struck off (see paras 35–36).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap perintah Mahkamah Tinggi bertarikh 13 Disember 2019 yang membenarkan responden meminda pembelaan dan tuntutan balas terpinda. Responden membangkitkan bantahan awal bahawa perintah Mahkamah Tinggi yang membenarkan pindaan semula pembelaan dan tuntutan balas adalah tidak boleh dirayu dan rayuan perayu adalah tidak kompeten in limine. Pada 13 Ogos 2015, perayu telah memulakan tindakan terhadap responden untuk mendapatkan semula wang yang kena dibayar dan terhutang di bawah kemudahan Al-Bai Bithaman Ajil yang diberikan oleh perayu kepada responden pertama ('kemudahan BBA'). Kesemua responden lain telah disaman sebagai penjamin di bawah kemudahan BBA. Pada 22 Oktober 2015, responden memfailkan pembelaan dan tuntutan balas

mereka. Pada 23 Disember 2015, responden telah meminda pembelaan dan tuntutan balas mereka ('pindaan pertama'). Perayu kemudiannya memfailkan permohonan untuk penghakiman terus terhadap responden melalui lampiran 17. Dalam menentang lampiran 17, responden mengemukakan laporan pakar yang disediakan oleh Dr Hakimah Yaacob menyatakan dapatan awal bahawa kemudahan BBA tidak patuh Syariah ('laporan awal'). Perayu kemudiannya menarik balik lampiran 17 dan pihak-pihak meneruskan pengurusan kes pra-perbicaraan. Semasa pengurusan kes, peguamcara responden menyatakan bahawa mungkin terdapat keperluan untuk meminda semula pembelaan dan tuntutan balas pindaan mereka selepas pakar mereka mengemukakan laporan penuh mengenai kesahihan kemudahan BBA dan pada 4 Ogos 2017, responden memfailkan permohonan untuk meminda semula pembelaan dan tuntutan balas terpinda melalui lampiran 52. Mahkamah Tinggi membenarkan lampiran 52 dan pindaan semula tersebut menjadi pembelaan dan tuntutan balas yang dipinda semula oleh responden ('pindaan kedua'). Semasa perbicaraan, responden memanggil dua saksi iaitu Dr Hakimah Yaakob ('DW1') dan Hamidah bt Osman ('DW2'). Pada 23 Oktober 2019, iaitu hari ke-34 perbicaraan, perayu telah mengambil bantahan terhadap jawapan yang diberikan oleh DW2. Perayu membantah keterangan DW2 bahawa perjanjian pembiayaan untuk kemudahan BBA telah ditandatangani menjelang akhir April 2011. Mahkamah menangguhkan perbicaraan dan tarikh perbicaraan baharu telah ditetapkan. Pada 4 November 2019, responden memfailkan permohonan pindaan semula melalui lampiran 188. Permohonan pindaan semula telah didengar pada 9 Disember 2019 dan keputusan akan diberikan ('pindaan ketiga'). Pada 13 Disember 2019, hakim yang bijaksana membenarkan permohonan pindaan semula. Perayu merayu terhadap keputusan hakim yang bijaksana dalam membenarkan permohonan pindaan semula pada 10 Januari 2020.

Diputuskan, membenarkan bantahan awal responden dan membatalkan rayuan dengan kos dalam kausa:

(1) Hujahan oleh perayu bahawa perintah bertarikh 13 Disember 2019 bukanlah 'keputusan yang dibuat semasa perbicaraan' adalah salah arah. Permohonan pindaan semula telah didengar pada 9 Disember 2019 dan pada 13 Disember 2019, permohonan pindaan semula dibenarkan sebelum perbicaraan diteruskan pada 13 Disember 2019. Walau apa pun, perbicaraan di Mahkamah Tinggi masih belum selesai, justeru Mahkamah Tinggi akhirnya tidak melupuskan hak pihak-pihak. Peristiwa tersebut menunjukkan bahawa permohonan responden telah dibuat semasa perbicaraan dan sebelum selesai perbicaraan oleh itu, perintah Mahkamah Tinggi bertarikh 13 Disember 2019 adalah 'keputusan yang dibuat semasa perbicaraan' (lihat perenggan 33–34).

(2) Berdasarkan fakta dan keadaan yang sama, mahkamah terikat dengan prinsip stare decisis dalam keputusan majoriti Mahkamah Persekutuan

dalam *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1 bahawa rayuan tidak bergantungan terhadap keputusan dalam permohonan pindaan yang dibuat semasa perbicaraan apabila keputusan sedemikian akhirnya tidak melupuskan hak pihak-pihak. Dalam keadaan itu, bantahan awal yang dibangkitkan oleh responden bahawa perintah Mahkamah Tinggi bertarikh 13 Disember 2019 tidak boleh dirayu dibenarkan. Rayuan tersebut tidak kompeten dan harus dibatalkan (lihat perenggan 35–36).]

Cases referred to

Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor [2009] 4 MLJ 833, CA (folld)

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1; [2020] 3 CLJ 153, FC (folld)

Bumiputra-Commerce Bank Berhad and others v Bumi Warna Indah Sdn Bhd [2004] MLJU 529; [2004] 4 CLJ 825, HC (refd)

Cassell & Co Ltd v Broome [1972] AC 1027, HC (refd)

Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party) [2016] 4 MLJ 100, CA (refd)

Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829; [1997] 3 CLJ 365, FC (refd)

Cropper v Smith (1884) 26 Ch D 700, CA (refd)

Dato' Seri Anwar Ibrahim v PP [2010] 6 MLJ 585, FC (refd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35, CA (folld)

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230, SC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] MLJ 301; [2015] 8 CLJ 1, FC (refd)

Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd [2019] 4 MLJ 614; [2019] 4 CLJ 131, FC (refd)

Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals [2000] 3 MLJ 328; [2000] 3 CLJ 797, CA (refd)

Merlimau Pegoh Limited v Collector of Land Revenue Jasin [1969] 2 MLJ 248 (refd)

Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals [2017] MLJU 445, CA (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (folld)

Sitrac Corp Sdn Bhd v Lim Siew Eng [2002] 3 MLJ 315, HC (refd)

Suhaili bin Ismail v Syarikat Sribima Sdn Bhd [2015] 6 MLJ 556, CA (refd)

Teo Kim Lian Jenny v Draland Sdn Bhd [2000] MLJU 740, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 67(1), 68, 68(1)
Rules of Court 2012 O 20 rr 5, 8, O 32 r 11

Appeal from: Suit No 22M-131–08 of 2015 (High Court, Kuala Lumpur)

Andrew Chiew Ean Vooi (Wong Han Wey with him) (Lee Hishamudin Allen & Gledhill) for the appellant.
Nasema Jalaludheen (Rachel See Aimay with her) (Cheah Teh & Su) for the respondents.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appellant's/plaintiff's appeal against the High Court's order dated 13 December 2019 which allowed the respondents/defendant to amend its re-amended defence and counterclaim.

[2] The respondents raise a preliminary objection that the High Court order allowing the re-amendment of defence and counterclaim is non-appealable, and the appellant's appeal is incompetent in limine.

[3] For purpose of the appeal we directed the parties to submit both on the preliminary objection and also the merits of the appeal.

[4] Having heard the submissions oral and written, we unanimously allowed the respondent's preliminary objection and struck off the appeal with costs in the cause.

[5] Since we have allowed the respondents' preliminary objection and the appeal is struck out there is no appeal before us. Even if the preliminary objection is not sustainable and had the appeal proceeded, we find there is no merit in the appeal and it ought to be dismissed.

BACKGROUND FACTS

[6] On 13 August 2015, the appellant brought this action against the respondents to recover monies due and owing under an Al-Bai Bithaman Ajil facility granted by the appellant to the first respondent ('BBA facility'). The remaining respondents were sued as guarantors under the BBA facility.

[7] On 22 October 2015, the respondents filed their defence and

counterclaim. On 23 December 2015, the respondents amended their defence and counterclaim ('first amendment'). A

[8] On 1 March 2016, the appellant filed an application for summary judgment against the respondents ('encl 17'). To oppose encl 17, the respondents produced an expert report prepared by Dr Hakimah Yaacob expressing a preliminary finding that the BBA facility was not Shariah compliant ('preliminary report'). B

[9] The appellant later withdrew encl 17. Parties proceeded with pre-trial case management. C

[10] During case management on 7 July 2017, the respondents' counsel indicated that there may be a need to re-amend their amended defence and counterclaim after their expert produce a full report on the validity of the BBA facility. Parties were directed to file their respective expert reports on the validity of the BBA facility; D

[11] On 28 July 2017, both parties filed their respective expert reports. E

[12] On 4 August 2017, the respondents filed an application to re-amend the amended defence and counterclaim ('encl 52').

[13] On 11 September 2017, the High Court allowed encl 52. The re-amendments become the respondents' re-amended defence and counterclaim ('second amendment'). F

[14] Trial commenced on 22 November 2017.

[15] The appellant closed its case on 5 September 2019. G

[16] On 22 October 2019 and 23 October 2019, the respondents called two witnesses ie Dr Hakimah Yaakob (DW1) and Hamidah bt Osman (DW2). H

[17] On 23 October 2019, ie 34th day of trial, the appellant took objection to an answer given by DW2. The appellant objected to DW2's evidence that the financing agreements for the BBA facility were signed 'something toward the end of April 2011'. The court adjourned the trial and a new trial dates were fixed on 11–13 December 2019. I

[18] On 4 November 2019, the respondents filed the re-amendment application (encl 188). The re-amendment application was heard on 9 December 2019 and the decision was reserved (third amendment).

[19] On 13 December 2019, the learned judge allowed the re-amendment application. The trial scheduled on 13 December 2019 was vacated. A case management was fixed on 15 January 2020.

[20] On 10 January 2020, the appellant appealed.

PRELIMINARY OBJECTION

[21] The respondents' preliminary objection is premised on the decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 3 CLJ 153. At the High Court the court allowed the appellant's application to amend its re-amended statement of claim to add a claim for special damages during midstream of the trial wherein six witnesses out of eight had already testified. The respondents appealed against the said High Court's decision and the appeal was allowed by the Court of Appeal. The Federal Court was called upon to determine whether the order made by the High Court in allowing the appellant's amendment application was appealable.

[22] In allowing the appeal and setting aside the decision of the Court of Appeal, the Federal Court speaking through His Lordship Idrus Harun FCJ held that:

> ... the High Court's decision to allow the amendment application was not appealable to the Court of Appeal. The appeal was incompetent in limine and, as such, could not be laid before the Court of Appeal as it was clearly precluded by the law ...

[23] His Lordship Idrus Harun FCJ (as he then was) in delivering the majority judgment of the Federal Court, inter alia, held that:

> [61] Accordingly, I have no difficulty in holding that the present position in the law clearly shows that an appeal does not lie against a decision in an amendment application made in the course of trial as is in this instant action, and moreover, such a decision does not finally dispose of the rights of the parties. There is in my judgment no basis in the respondents' contention that the High Court's decision is appealable as it is a ruling made in the course of hearing the interlocutory application but rather a decision made at the conclusion of the hearing of the said application on its merits. Yet to my mind, the respondents have obviously misconstrued the definition of 'decision' in s 3 in the context of s 67 of the Act. What characterises as being a decision as being appealable or otherwise is not only confined to a question of whether a ruling has disposed of the final rights of the parties but also whether it is a decision made in the course of a trial or matter. Therefore, it matters not if the decision is made at the conclusion of the interlocutory application. The plain fact is that such interlocutory application was indisputably made and heard in the course of the trial of the instant suit. It was

decided before the High Court delivered its judgment on liability.

[24] His Lordship Azahar Mohamed CJ (Malaya) in concurring with the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd* referred to the Federal Court's decision *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614; [2019] 4 CLJ 131 and held amongst others that:

> [76] The Federal Court in *Kempadang* further held that the definition of s 3 acts as an additional exclusion of the types of matters that cannot be appealed against. The Federal Court's opinion on this, which I accept as a correct statement of law, reads as follows:
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> [26] Civil matters which are not appealable to the Court of Appeal are listed in sub-s 68(1). For instance, there can be no appeal against a judgment or order made by consent of parties or a judgment or order, which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of s 3 of the CJA when it qualifies the word 'decision' as opposed to 'ruling' of the court ...
>
> [77] The decision is a clear authority to support the proposition that s 67(1) read with s 3 and s 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties. Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of 'decision' in s 3 of the CJA and thereby appeal against every decision of trial court, which would indisputably delay the administration of justice.

[25] In addition, His Lordship held at para 79 that:

> The present position in the law holds that an appeal does not lie against a decision in an amendment application made in the course of a trial and, further, such a decision does not finally dispose of the rights of the parties ...

[26] The respondents also relied on the Court of Appeal case in *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100. The issue in this case was whether the sessions court's dismissal of the application by the appellant to amend his statement of claim midway through trial was a 'decision' within the meaning of s 3 of the Courts of Judicature Act 1964 ('the CJA') that could be appealed against. The appellant sued the respondents in the sessions court for damages arising from a road accident. After a witness had testified and the trial was adjourned to another date, the appellant filed an application to amend his writ and statement of claim to include an additional claim for 'cost of professional care'. The trial court dismissed the said application. On appeal to the High Court, the High Court sustained a preliminary objection by the respondents and the third party that the trial court's ruling was not a 'decision' under s 3 of the CJA which could be appealed against as it was 'made in the course of a trial or

hearing and did not have the effect of finally disposing the rights of the parties'. The appellant argued that an application to amend pleadings was not caught by s 3 of the CJA as the Rules of Court 2012 allowed such an application to be made at any stage of the proceedings including after trial but before judgment was handed down.

[27] In dismissing the appeal, this honourable court, inter alia, held that:

> (2) There was no doubt that a decision on an application to amend the writ of summons and statement of claim was one made during the course of trial which did not finally dispose of the rights of the parties and, therefore, was not a decision within the meaning of s 3 of the CJA. To concede to the contention that the instant appeal was appealable was to give a party an extra bullet, so to speak, to delay an expeditious trial and this was inconsistent with the jurisprudence of the present regime of civil procedure.

[28] On the present facts, the respondents submitted that the High Court order is a decision made during the course of trial as encl 188 was filed on 14 November 2019 after DW2, had testified on 23 October 2019 and the trial was adjourned to another date. The High Court judge heard the re-amendment application in encl 188 on 9 December 2019 and allowed encl 188 on 13 December 2019 when the trial at the High Court has yet to be completed. Since the trial at the High Court has yet to be completed, the High Court could not be said to have finally disposed of the right of the parties following the decisions in *Asia Pacific Higher Learning Sdn Bhd* and *Christopher ak Bandi*. The respondents submitted that the High Court order is certainly not appealable.

[29] The appellant argued that the present definition of 'decision' came into effect following an insertion pursuant to the Courts of Judicature (Amendment) Act 1998. The 1998 Act did not however define what 'ruling' was. The words 'ruling made in the course of a trial' refer to rulings when the court is hearing the action brought under the writ of summons. Further, the meaning of 'decision' under s 3 should be read separately with s 67(1) of the CJA.

[30] The appellant relied on the dissenting judgment by David Wong Dak Wah CJ (Sabah and Sarawak) (as he was then) in *Asia Pacific Higher Learning Sdn Bhd* which held that s 67(1) clearly does not include the word 'decision'. Further, since s 68 already limits civil matters that could not be appealed, His Lordship held there was no reason to futher limit the jurisdiction of the Court of Appeal under s 67(1) by reference to the definition of 'decision' under s 3.

[31] Whether, in the present case, the order dated 13 December 2019 was a 'ruling made in the course of a trial or hearing of any cause or matter which

does not finally dispose of the rights of the parties some case laws and authorities including Parliament *Hansard* were cited by the appellant on the definition of the words 'ruling', 'decision' and 'trial' (see: *Teo Kim Lian Jenny v Draland Sdn Bhd* [2000] MLJU 740; *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315; *Merlimau Pegoh Limited v Collector of Land Revenue Jasin* [1969] 2 MLJ 248; and *Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals* [2000] 3 MLJ 328; [2000] 3 CLJ 797). By interpretation of the words 'decision', the appellant submitted that the order dated 13 December 2019 is appealable

[32] In our view, such arguments have been canvassed in *Asia Pacific Higher Learning Sdn Bhd*. The appellant is relying on the minority decision (dissenting judgment) and concluded the High Court's decision was not made in the course of trial. In contrast, the majority judgment held that s 67(1) read with ss 3 and 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties otherwise, appeals against every decision of trial court, would indisputably delay the administration of justice.

[33] In our considered view, the argument by the appellant that the order dated 13 December 2019 is not a 'ruling made in the course of a trial' is misplaced. The re-amendment application was heard on 9 December 2019 and on 13 December 2019, the re-amendment application was allowed before continuation of trial on 13 December 2019. The continuation of the trial was scheduled on 13 December 2019 but vacated after the re-amendment application was allowed on the same day. The action was then fixed for case management on 15 January 2020. In any event the trial at the High Court has yet to be completed, hence the High Court does not finally dispose of the right of the parties.

[34] It was also argued that the sealed order clearly shows the order dated 13 December 2019 was made pursuant to a hearing in chambers made by the respondents under a notice of application. The re-amendment application was an interlocutory application, which was heard and ordered in chambers under O 32 r 11 of the Rules of Court 2012. Be that as it may, the events show that the respondent's application was made during the trial and before the completion of trial therefore, the order of the High Court dated 13 December 2019 is a 'ruling made in the course of a trial'.

[35] On the same facts and circumstances, this court is bound by the principle of stare decisis in the majority decison of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd* that an appeal does not lie against a decision in

an amendment application made in the course of a trial when such a decision does not finally dispose of the rights of the parties.The Federal Court decision in the *Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829; [1997] 3 CLJ 365 already sets out the principle succinctly that in the hierarchical system of courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers (see: the remarks of Lord Hailsham in *Cassell & Co Ltd v Broome* [1972] AC 1027 at p 1054D and E).

[36] In the circumstances, we allow the preliminary objection raised by the respondents that High Court order dated 13 December 2019 is non-appealable. The appeal is incompetent in limine and ought to be struck off.

[37] For the sake of completeness, we give our view on the said High Court order dated 13 December 2019.

[38] The appellant's appeal is confined to the amendmens in paras 13 and 14(b)(i) and (i)(A) of the re-re-amended defence and counterclaim ('impugned amendments'). Those amendmends, are set out below.

> 13. The 1st Defendant (by original action) admits having executed instruments under the financing facility pleaded in paragraph 6 of the Statement of Claim ('the Financing Facility) *sometime towards the end of April 2011* but the Financing Facility was and nor in accordance with the Islamic principles of Bai al-Inah Al-Bai Bithaman Ajil ('BBA') and/or Shariah and/or any lawful Islamic principles.
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> 14. The 1st Defendant (by original action) avers that the Financing Facility and/or the principal financing documents referred to in paragraphs 9(a) and 9(b) of the Statement of Claim (ie the Asset Purchase Agreement and the Asset Sale Agreement) are in contravention of Inter alia section 59(2) of the Central Bank of Malaysia Act 2009 and section 13A of the Islamic Banking Act 1983, *are tained with illegality, void (bathil) in Shariah and are unenforceable in law.*
>
> Particulars ...
>
> (b)(c) the nature and/or the manner of execution of the Asset Purchase Agreement and/or the Asset Sale Agreement are in contravention of the written circulars, guidelines and/or notices issued by Bank Negara of Malaysia and/or the advice of the Shariah Advisory Council's resolting including the Resolutions dated of 8.7.1997, 12.12.1998, 11.11.200 and 17.2.2009 inter alia in the following manner:
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> (i) *There is no record of the of the execution of the Asset Purchase Agreement and the Asset Sale Agreement and the Asset Sale Agreement is are in contravention of the Shariah requirement that the second transaction should not be executed simultaneously and/or together with the first transaction.* The sequence is incorrect as the Asset Purchase Agreement was not completely executed before the conclusion of the Asset Sale Agreement;

(i)(A) Both the Asset Purchase Agreement and the Asset Sale Agreement were not concluded at different times.

[39] The appellant submitted that the impugned amendments allow the respondents to raise a different and new defence after the close of the appellant's case. The other complaint is that the impugned amendments were made after the 34th day of trial without any explanation for delay. The court should not have allowed a late amendment without any cogent reasons for the delay. The amendments were sought after the plaintiff had closed its case. The impugned amendments had prejudiced the appellant.

[40] We heard the submissions on the grounds raised by the appellant.

We have read the grounds of judgment of the learned judge. With the same objections raised against the impugned amendments before us and at the court below, we find all the objections raised by the appellant have been considered by the learned judge. From her judgment, we are satisfied that in exercising her discretion to allow the impugned amendments, she had given her reasons for allowing the impugned amendments and had correctly followed the established law applicable to amendmend to pleading.

[41] As correctly held by the learned judge, the application for amendment was made under O 20 rr 5 and 8 of the Rules of Court 2012 which give the power of the court to any stage of proceeding to allow any party to amend his pleading.

[42] Further, to ensure that neither party in the adversarial system is taken by surprise or unfairly prejudiced in any proposed amendments made by a party to the proceeding and in exercising the discretion, the court will be guided by the principles of law expounded in the decided cases relating to amendments (see *Bumiputra-Commerce Bank Berhad and others v Bumi Warna Indah Sdn Bhd* [2004] MLJU 529; [2004] 4 CLJ 825). Further, in *Suhaili bin Ismail v Syarikat Sribima Sdn Bhd* [2015] 6 MLJ 556, which held that the rule that amendments to pleadings could be sought at any stage of the proceeding after the close of pleadings. The Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] MLJ 301; [2015] 8 CLJ 1 (FC), held that an applicant in such a situation bears the onus to justify the late application for amendment to the pleadings and that the applicant must show the strength of the new case.

[43] The appellant had objected to the insertion of the words 'sometimes towards the end of April 2011' in para 13 of the impugned amendments. The appellant's case is that the insertion of such words has the effect of introducing a new allegation that the BBA financing documents were executed by the

respondents in or around end April 2011. Thus the amendment introduces a new challenge on the date of execution of the BBA financing documents.

[44] Having heard the submissions, the learned judge held that para 13 of the impugned amendments is not a new challenge on grounds that there is clear evidence through PW1 before the court that the BBA financing documents had already been executed by the respondents before the appellant executed the same. The court cannot disregard material facts which is relevant to assist the court to determine whether execution of the asset purchase agreement and asset sale agreement are in contravention of Syariah principles which is already pleaded in para 14(c)(i) of the re-amended defence. According to her, dismissing the respondents' para 13 of the impugned amendments would not do justice to the case. Further, despite that it was made after the appellant had closed their case and after they had signed the financing documents on 4 May 2011 that does not mean the execution of the financing documents on 4 May 2011 are in compliance with the requirements of Syariah principles/Syariah Advisory Council Resolution.

[45] The appellant also objected to para 14(b)(i) and (i)(A) of the impugned amendments being a new defence because the initial challenge is that there was no record of time of execution to both the asset purchase agreement and asset sale agreement and that the transaction should not be executed simultaneously. According to the appellant, it cannot be expected to take sequential completion, as part of the respondents' defence, when it is not specifically pleaded, especially since it involves technical issues of whether the BBA facility was Syariah compliant. More importanly, the court should likewise only consider whether the first transaction has been completed if sequential completion was specifically pleaded.

[46] The learned judge had considered the appellant's objection. Firstly, she considered para 14(c) of the re-amended defence where it is pleaded that the execution of the asset purchase agreement and asset sale agreement are in contravention of the Syariah requirement in that the second transaction (asset sale agreement) should be executed simultaneously and/or together with the first transaction (asset purchase agreement). Based on para 14(c) (the original text) it is pleaded that such contavention is premised on the absence of the recording of when both the agreements were executed. The recording when both the BBA financing documemts were executed would facilitate the determination whether the execution of the asset purchase agreement and asset sale agreement is in sequence as required under the Syariah principles. So the issue is and has always been sequence of the execution of both the said agreements.

[47] In relation to para 14(b)(i) and 14(b)(i)(A) of the impugned

amendments, the learned judge opined that the issue on sequence is further expanded and clarified in that the asset purchase agreement was not completely executed before the asset sale agreement was concluded. Paragraph 14(b)(i) is consistent with PW1's evidence that the asset purchase agreement and asset sale agreement had already been executed by the respondents before they signed the same on 4 May 2011. The learned judge formed her view that the issue of the sequence of execution of both agreements remains unchanged. The learned judge held that paras 14(b)(i) and 14(b)(i)(A) do not change the asset purchase agreement and asset sale agreement were in contravention of the Syariah principles on the ground that the execution of the same were not transacted in the sequence as required by the Syariah principles.

[48] In relation to para 14(b)(ii) of the impugned amendments, the learned judge considered the objections raised by the appellant and found that upon her reading of para 14(b)(ii) of the impugned amendments and para 14(c)(iv) of the re-amended defence, she found that there is nothing to suggest that para 14(b)(ii) introduces a new challenge to the issue of inter-conditionality and/or that it has changed the respondents' defence which caused prejudice to the appellant. She held that the objection is without merit.

[49] Finally on the issue of delay on the part of the respondents in making the application to amend, the appellant contended that it could have been made in the second amendment in 2017 and further contended that the respondents failed to provide cogent and reasonable explanation to justify the delay. Before us, the appellant submitted that the learned judge has agreed and accepted the fact that the respondents' affidavits did not show the issue of delay and the explanation thereto is not mentioned at all.

[50] We agree with the appellant and that contention is found at para 46 of the grounds of judgment. Be that as it may, the learned judge has given her explanation and reason for rejecting the appellant's objection despite the fact that there was delay on the part of the respondents.

[51] At para 47 of her judgment, the learned judge said as follows:

> [47] Despite the late Application to amend, the issues on sequence (ex-parte execution of the BBA Financing Documents in particular the Asset Purchase Agreement and Asset Sale Agreement simultaneously and inter-conditionality (stipulation to repurchase the Assets) has been raised and presented during the trial through the plaintiff's witnesses (PW 1) the bank officer of the plaintiff who signed both the Agreement and PW 5 (the plaintiff's expert witness) and the defendants' expert witness (DW1).

[52] The learned judge explained her decision in her illustration relating to the evidence of PW5 and PW1 at paras 48–57 of the judgment. Her finding is

at para 60 when the learned judge held as follows:

> [60] In the instant case, the defendants may have erred for not making the Application to amend during the Second Amendment but taking into account what had transpired in this case this court is of the view the defendants ought not to be punished for their mistake. To do so by not allowing the Proposed Amendments would deprive this court from adjudicating constructively the issues for purpose of determining the real question in controversy and the rights of the parties.

[53] In support of her view, she referred to *Cropper v Smith* (1884) 26 Ch D 700 which held that it is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Also in *Hong Leong Finance* one of the criteria to be considered when dealing with late application for amendment is that the proposed amendments must disclose full particulars in order to enable the court to ascertain if there is a real prospect of success in proving the same.

[54] The learned judge was of the view that para 13 of the impugned amendment which deals with ex parte execution of the asset purchase agreement and asset sale agreement by the respondents read together with paras 14(b)(i) and 14(b)(i)(A) and para 14(b)(ii) and relevant particulars ought not to be disregarded in order to ascertain not only the success of the respondents' case but also that of the appellant. She held that althogh there is delay on the part of the respondents in making the application to amend it does not prejudice the appellant as the issues in the impugned amendment are not entirely new issues which are distinct from the respondents' pleaded case in the re-amended defence.

[55] In our view, be that as it may, delay per se does not equal prejudice or injustice (see: *Alloy Consolidated Sdn Bhd & Anor v Anjari Properties Sdn Bhd & Anor* [2009] 4 MLJ 833). In *Alloy Consolidated Sdn Bhd*, the appellants appealed against High Court's decision in allowing the first and second respondents' application to amend their respective statement of defence to include the counterclaim. Both appeals were dismissed by the Court of Appeal with costs. In determining the issue of delay, the Court of Appeal, inter alia, held that:

> On the issue of delay, suffice to say that delay per se did not equal prejudice or injustice. In fact, the proposed amendment was applied for to reflect the first respondent's true case against the appellants. As such the application to amend was not made mala fide. If the amendment was allowed the appellants would suffer no prejudice or harm that cannot be compensated by costs but if the amendment was not allowed then the first respondent would forever be shut out from receiving justice. Therefore the amendment should be allowed and the High Court judge had not erred in making an order to that effect.

[56] We agree with the learned judge. In fact, the amendments are necessary for the purposes of determining the real question in controversy between the parties (see: *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230).

[57] Having read the grounds of judgment, we are satisfied that the learned judge has made the right decision. We agree with her finding which concluded that the impugned amendments do not create new or additional defence which makes it difficult for the appellant to pursue their claim or that they do not result in the appellant being prejudiced. We also agree with her that the issue of delay raised by the appellant, the reason ought not to be the factor to dismiss the application to amend. We find that there is no error or mistake in her exercise of discretion to allow the impugned amendment.

[58] It is trite law as well that the appellate court will not ordinarily interfere with the exercise of discretion of the trial court in relation to procedural and/or interlocutory matters (see: *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35).

[59] In dismissing the appeal with costs, Lord Guest in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 amongst others held that:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* [1942] AC 130 per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473).

[60] Guided by *ECM Libra Investment Bank Bhd* and *Ratnam*, we hold that the learned judge has exercised her discretion based on correct principles of law and there is no miscarriage of justice. Thus, there is no need or justification for appellate inference by this court.

Respondent's preliminary objection allowed and appeal struck out with costs in the cause.

Reported by Mohd Kamarul Anwar